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IN THE

Supreme Court of the United States

October Term, 1966.

No. 570.

BENJAMIN COHEN,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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No.

BENJAMIN COHEN.

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BENJAMIN COHEN, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 21, 1966.

OPINIONS BELOW.

The opinion of the court below (Appendix A, *infra,* pp. A1-A17) has not yet been reported.

JURISDICTION.

The judgment of the court below (Appendix B, *infra,* p. A18) was entered on July 21, 1966. A timely petition for rehearing was denied on August 24, 1966 (Appendix C, *infra,* p. A19). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether, when a co-defendant's testimony is vital to the defense in a criminal case, and such co-defendant has been severed upon his affidavit that he will not testify, the defendant on trial is required to call the severed co-defendant to the stand to claim his privilege as a prerequisite to establishing the co-defendant's testimonial unavailability.

2. Petitioner was convicted of tax evasion, the major item in question being whether he had in fact made a payment to one Rosenbaum, who had also been indicted but was severed after representing that he would not testify. Without Rosenbaum's testimony, petitioner sought to prove the fact of payment by Rosenbaum's receipt for the money and Rosenbaum's tax return that reflected the payment; the prosecution countered with evidence tending to show that Rosenbaum was impecunious, did not pay his debts, and had not paid his taxes. During the pendency of petitioner's appeal, Rosenbaum paid the tax on the precise sum petitioner had been convicted of not paying to him. A little later, by reason of the dismissal of the indictment against him, Rosenbaum became testimonially available.

The question presented is whether petitioner should be granted a new trial now that Rosenbaum has become testimonially available, or at a minimum, whether the principle of *United States v. Shotwell Mfg. Co.*, 355 U. S. 233, requires the case to be remanded to the district court for reexamination of the payment issue in the light of the subsequently occurring facts.

STATUTE INVOLVED.

Petitioner was convicted of violating § 7201, I. R. C. 1954, "Attempt to evade or defeat tax"; the text of this provision is familiar; it is not set forth here since nothing in the present petition turns on its precise terms.

STATEMENT.

Petitioner was charged in a three-count indictment R. 1284-1287) with violating § 7201, I. R. C. 1954, by willfully understating his income for the years 1960 (Count One) and 1961 (Count Two). Appellant was not named in Count Three, and he was acquitted on Count Two (R. 1316, 1317).

Count One (R. 1284-1285), which is therefore alone in question, charged petitioner with filing a false income tax return setting forth taxable income for the year 1960 in the amount of $43,941.53, instead of in the alleged true amount of $78,441.53. One, Edward G. Rosenbaum, was named in Count One as an aider and abettor.

In due course, on motions made at different times by petitioner, by Rosenbaum, and by the prosecution, petitioner and Rosenbaum were severed (R. 8, 9, 11). Rosenbaum's affidavit filed in the district court in support of his own motion for severance stated "2. That after conferring with his counsel he does not intend to take the stand in the event of a trial on said charges."[1] (Petitioner's Pet. for rehearing filed in court below, p. 11).

1. Nine copies of petitioner's petition for rehearing have been filed with the Clerk of this Court.

The asserted difference in petitioner's taxable income for 1960 as set forth in Count One, $34,500, was arrived at as follows:

Petitioner received $60,000 in cash from one, Sam Eig, a real estate operator of Silver Spring, Maryland, as part of a brokerage commission for obtaining from the Teamsters' Union Pension Fund financing for Eig's motel projects. The asserted difference of $34,500 was made up of sums that petitioner contended were the actual shares paid to his joint venturers in the brokerage arrangement, Rosenbaum and one, Charles S. Tobin, shares that the prosecution charged were not paid by petitioner to these two in 1960.

The most closely contested issue at the trial, which consumed 14 full days, at which 61 witnesses testified, 144 exhibits were received, and a transcript aggregating 2871 pages was compiled (R. 1300), was whether petitioner had paid Rosenbaum $30,000.

Such payment was evidenced by Rosenbaum's receipt, dated March 8, 1960 (Govt. Ex. 185, R. 1479), and by Rosenbaum's own tax return for the year 1960, which reported receipt of the $30,000 (Govt. Ex. 3, R. 1436, especially at 1438).

Rosenbaum being a severed defendant, he was not called by either party; the trial judge's memorandum recites (R. 1312) that "neither side was in a position to call as a witness the severed defendant, Rosenbaum * * *".[2] The prosecution accordingly sought to prove, by a species of reverse net worth, that he could not have received the $30,000. Evidence was introduced to

2. Not until the opinion filed by the court below was there any intimation that petitioner was required to call Rosenbaum to the stand and force him to claim his privilege as a prerequisite to proving his availability.

show that Rosenbaum had not paid the tax due on the $30,000 received from petitioner (R. 680), and that he owed substantial Federal taxes for previous years (R. 681-682) in the amount of $35,000, a sum that had been outstanding since 1951 (R. 869), and that although assessments had been made, the balance due had never been collected (R. 870-873). It was shown that Rosenbaum's tax liability had been in excess of $400,000, but that no payments had been made in 1960 on the balance due (R. 874).

Other witnesses testified to Rosenbaum's non-payment of certain hospital, medical and dental bills (R. 781 *et seq.;* R. 804-818), to his failure to contribute to litigation costs in regard to an estate when his interest therein was attached by the Government (R. 819, 824-833); and to the repayment by his sister of a loan made to him (R. 836-845). Another of Rosenbaum's sisters testified that she made small loans to him that he repaid (R. 846-849, 853-855). One witness told of loans made to Rosenbaum on the basis of friendship as to which repayment was not sought (R. 862-864). Tobin, one of the joint venturers, testified that late in 1960 or early 1961, when Rosenbaum was going into the hospital for surgery and sought to borrow $1,000, he asked petitioner for his suggestion, and that petitioner advised him not to lend money to Rosenbaum because the latter borrowed money from everyone and was a deadbeat (R. 391-393).

Jury trial having been waived, the trial judge at the close of all the evidence found petitioner guilty on Count One (R. 1299, 1302, 1317), finding specifically that Rosenbaum did not receive $30,000 or any substantial portion thereof during the year 1960 (R. 1313-1315).

Another though less sharply contested issue during the trial was whether petitioner paid to his coventurer Tobin $10,000 of the sum received from Eig. Tobin signed a receipt evidencing payment of the $10,000 on March 8, 1960 (Govt. Ex. 7, R. 1441; Def. Ex. 44, R. 1481), and this payment was reflected in Tobin's 1960 income tax return (R. 383-387; Def. Ex. 41, not printed).

Subsequently, following an investigation into petitioner's affairs (R. 393, 433, 460, 463), Tobin told the F. B. I. and a Federal Grand Jury that he had received $5500 from petitioner in 1960, that the balance of $4500 was paid in 1961, and that then the receipt had been back-dated; and Tobin so testified at the trial (R. 385, 387-388, 471-473, 485-486). Also subsequently, and at the suggestion of internal revenue agents, Tobin filed amended tax returns on the basis of having received the $10,000 over two years rather than one, and obtained a refund accordingly (R. 461, 462, 475-476, 486-488; Def. Ex. 41, not printed). On this issue also, the trial judge made special findings adverse to petitioner (R. 1309-1310).

On the whole issue of liability under Count One, which, the judge said, "must be determined by the credibility of the witnesses" (R. 1315), he made findings of credibility adverse to petitioner's testimonial contentions at the trial (R. 1315-1316). But the judge simultaneously found petitioner Not Guilty on Count Two (R. 1316, 1317).

Following the filing of a timely notice of appeal (R. 1360), and before that appeal was argued in the court below, Rosenbaum in fact paid all of his 1960 taxes, the last payment having been made early in January 1966; this fact was admitted by Government counsel in the court below during argument.

Earlier, when a Government witness testified at the trial, on November 25, 1965, Rosenbaum had a tax liability outstanding (R. 859, 875-876). The record shows that the Internal Revenue Service abated over $178,000 of Rosenbaum's taxes in 1948 (R. 1250), but it is a fact that the Service never abated any of his 1960 taxes under § 6404, I. R. C. 1954.

Rosenbaum was scheduled to go on trial in his own case on January 4, 1966. Prior to that date, he had paid part of his 1960 taxes, and his counsel so advised the district court at a pretrial hearing on December 30, 1965. Following the pretrial hearing and before the actual date of his trial (and doubtless in anticipation of that trial), Rosenbaum paid all of his 1960 Federal income tax then due. Moreover, for the year 1965, Rosenbaum reported earnings of $28,000 derived from "finders' fees," the precise kind of income involved for the year 1960.[3] (Petitioner's Reply Br. filed in court below, pp. 13-14)

As we have said, Government counsel at the argument below conceded the making of these payments.

More than that, Rosenbaum was not in fact put on trial on January 4, 1966, as planned, but, to the contrary, the indictment against him was dismissed on February 26, 1966.

None the less, the court below affirmed. It made no mention in its opinion of the fact, admitted at the bar of its court, that Rosenbaum had paid and the Government had retained the tax on $30,000 received from petitioner in 1960.

In respect of Rosenbaum's testimony, the court made no mention of the trial judge's statement (R.

3. Nine copies of petitioner's reply brief have been filed with the Clerk of this Court.

1312) that neither side was in a position to call him; instead the court below said (*infra*, p. A16):

> "The defense could have called Rosenbaum. The choice not to do so was no doubt the product of the careful strategy of the outstandingly able counsel who represented Cohen. * * * we think the whole matter dissolves when it is remembered that had Rosenbaum been called he could immediately have invoked his constitutional privilege against self-incrimination regardless of whether he was or was not under indictment. At any rate, the defense could not preserve the point, if there is one, by simply assuming unavailability."

REASONS FOR GRANTING THE WRIT.

Petitioner, a lawyer who has been over 38 years at the Bar (R. 984), was prosecuted and stands convicted and sentenced to imprisonment and marked for professional destruction for the crime of having in effect represented in his tax return that he paid $30,000 to Rosenbaum, while, simultaneously, the same Government that prosecuted him has been paid and retains and has never abated the tax due from Rosenbaum on the footing that he in fact received this precise $30,000 from petitioner.

Surely, a result so unconscionable calls for a better answer, and one more consonant with justice, than that given below. We submit that the present posture of the case stems directly from the disregard of important and controlling principles of law by the court below, and that review by this Court is accordingly required.

First. We argued below that the United States could not properly prosecute an individual for acts in respect of which it simultaneously deprives him of his defense against such a prosecution, in this instance depriving him of Rosenbaum's testimony by causing Rosenbaum to be indicted as a co-defendant, by analogy to the principle that a judgment of conviction cannot stand where the prosecution has withheld evidence from the defense, whether deliberately as in *Brady v. Maryland,* 373 U. S. 83, or negligently as in *United States v. Consolidated Laundries Corp.,* 291 F. 2d 563 (C. A. 2); and particularly by analogy to the decisions where the Government in a criminal case asserted a privilege in documents that the accused needed in order to defend against the accusation made. In that

situation, the Second Circuit held that the Government must choose between giving up the privilege and giving up the prosecution; it cannot prosecute for matters connected with materials that it refuses to disclose; it will not be permitted to prosecute one of its citizens while simultaneously, by asserting privilege in respect of relevant matter, it impairs his ability to defend. *United States v. Andolschek,* 142 F. 2d 503; *United States v. Grayson,* 166 F. 2d 863. It was these decisions and this precise line of reasoning that led, first to *Jencks v. United States,* 353 U. S. 657, 670-672, and then to the Jencks Act, 18 U. S. C. § 3500. Significantly, a conviction cannot stand if Jencks Act documents have been deliberately destroyed before trial. *United States v. Lonardo,* 350 F. 2d 523 (C. A. 6).

The foregoing argument, premised on Rosenbaum's unavailability at the trial, has now been rendered moot by the circumstance that the indictment against him has, since that trial and before the argument below, been dismissed; this was done on February 26, 1966; so that, either in the event of a new trial in this case, or even only of a further hearing, Rosenbaum will be available as a witness.

But the court below held that Rosenbaum had not been shown to be unavailable because he was not called to the stand to claim his privilege, a ruling that runs counter to all authority.

1. Since Rosenbaum in his affidavit supporting his motion for severance had said he would not testify, calling him to the stand simply to require him to reassert his privilege would have been a vain act—and, certainly up to now, the law has not insisted on the performance of useless acts. *Tacey v. Irwin,* 18 Wall. 549, 551; *Sims v. Everhardt,* 102 U. S. 300, 310.

2. Every other Circuit considering the point has uniformly held that it is a prejudicial error in respect of a defendant on trial to require either an accused or a witness known to intend to claim his privilege to make that claim of privilege from the stand. *United States v. Housing Foundation of America,* 176 F. 2d 665 (C. A. 3); *Fletcher v. United States,* 332 F. 2d 724 (D. C. Cir.); *United States v. Echeles,* 352 F. 2d 892 (C. A. 7). As the Third Circuit said in the case first cited (176 F. 2d at 666), "the plain difference between the privilege of witness and accused is that the latter may not be required to take the stand at all." And in the present case, certainly, where Rosenbaum was simultaneously a co-defendant and a key witness who had declared on oath his considered refusal to testify, calling him would not have constituted the "few lapses" that were considered in *Namet v. United States,* 373 U. S. 179, and there held not significant.

3. Wigmore is in accord: 8 *Evidence* § 2268 (3d ed., 1940, p. 396; McNaughton rev., 1961, p. 410):

> "3. *Codefendant.* For a *codefendant* in a *criminal case,* the privilege of course applies—i.e., one defendant cannot call a codefendant unless the latter waives his privilege."

4. We emphasize the words, "cannot call." Accordingly, the trial judge was plainly right in ruling (R. 1312) that "neither side was in a position to call as a witness the severed defendant, Rosenbaum * * *."

It follows that the case must be considered on that footing, and that the court below committed both error and injustice by characterizing Rosenbaum's non-appearance as simply an instance of astute or even tricky trial tactics.

Second. Deprived of the testimony of Rosenbaum, the other party to the contested transaction, petitioner did the best he could with what he had: He took the stand himself to testify to the fact of payment (R. 990, 992, 1057). This testimony was corroborated by Rosenbaum's receipt[4] for the $30,000 (Govt. Ex. 185, R. 1479) and by Rosenbaum's tax return that reflected the $30,000 as income (Govt. Ex. 3, R. 1436, 1438).

The prosecution countered with net worth in reverse; it endeavored to show that because Rosenbaum did not pay his taxes, did not pay other bills, borrowed without repayment, and was said to have been characterized by petitioner as a deadbeat, it necessarily followed that he could not have received $30,000 from petitioner, a Q. E. D. that impressed the trier of facts (R. 1315).

We think that this conclusion did not follow, that the trial judge's reliance on the foregoing evidence was not justified, and that the use of such evidence was not only erroneous but prejudicial, for two reasons.

One, the basis of straight net worth is that an increase of assets can only result from income, inheritance, or gift; even so, this Court has recognized that the net worth method "is so fraught with danger for the innocent that the courts must closely scrutinize its use," and that the "pitfalls inherent in the method * * * require the exercise of great care and restraint." *Holland v. United States,* 348 U. S. 121, 125, 129.

Two, not only were no safeguards used here, but the reverse net worth method rests on the fallacious

4. Of course the receipt was back-dated since no receipt was given at the time of the payment of money.

assumption that every recipient of money uses it either to pay his debts or to improve his level of living. We say fallacious, because that assumption ignores too many volitional and subjective variables to permit drawing the ultimate inference that the trial court here drew, namely, the conclusion that Rosenbaum's "penury" was proof that he could not have received the money for which he receipted and which he returned as income. After all, many persons with means at hand fail to pay their debts. See *United States v. Palermo,* 259 F. 2d 872 (C. A. 3); *Atwood v. Scott,* 99 Mass. 177.

Since the time that the present case was tried, however, better, stronger, and more cogent evidence bearing on its central issue has become available. Rosenbaum's indictment has been dismissed, so that he is now compellable as a witness. And Rosenbaum has paid the tax due on the $30,000 that petitioner said he gave him—in respect to the asserted non-payment of which petitioner now faces jail. More than that, the same Government that is about to incarcerate petitioner for not making the payment is keeping and has never abated the tax that Rosenbaum paid on the footing that he received this identical payment.

We submit that the present posture of the matter is so thoroughly unconscionable that, in the interests of the fair administration of justice, petitioner must be granted a new trial, at which the foregoing facts and all of their surrounding circumstances can—and should—be thoroughly and painstakingly explored. Cf. *Delbridge v. United States,* 262 F. 2d 710 (D. C. Cir.); *Benecke v. United States,* 356 F. 2d 439, 441 (C. A. 5).

Third. We have not overlooked the trial judge's adverse finding in respect of the other questioned pay-

ment, to Tobin. But that was a lesser issue, and in the outcome was obviously influenced and indeed overshadowed by the contest over and the resolution of the issue arising out of the questioned payment to Rosenbaum. It is simply unrealistic to suggest that the trial judge would have found petitioner guilty on Count One if he had also found that petitioner in fact had paid the $30,000 to Rosenbaum, the latter a conclusion now susceptible of far stronger support because of Rosenbaum's later tax payment and his current testimonial availability.

Fourth. Of course "It is more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding." *Bartone v. United States,* 375 U. S. 52, 54. For that reason we think a new trial is indicated here. But, at a minimum, the case should be remanded to the district court under the principle of *Shotwell Mfg. Co. v. United States,* 355 U. S. 233, for reconsideration of its finding of nonpayment in the light of the additional matters not available to it at the time of the original trial: The fact that Rosenbaum has now actually paid the tax on the $30,000 that petitioner was convicted of not giving him, and the fact that the Government has never undertaken to abate Rosenbaum's tax liability in respect of that $30,000, and, preeminently, the fact that Rosenbaum, no longer under indictment, is now compellable to testify.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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September 1966.

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APPENDIX A.

OPINION BELOW.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 22505.

BENJAMIN COHEN,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(July 21, 1966.)

Before WISDOM and COLEMAN, *Circuit Judges,* and HUGHES, *District Judge.*

COLEMAN, *Circuit Judge:* Appellant was indicted, on two counts, for attempting to evade and defeat income taxes due and owing by him and his wife for the

years 1960 and 1961 in violation of 26 U. S. C. 7201.[1] The case was submitted to the Court, without a jury, in a trial which lasted fourteen days. Mr. Cohen was acquitted as to 1961, found guilty as to 1960, and sentenced to fine and imprisonment.

We are of the opinion that the conviction must be affirmed.

The prosecution was grounded on an alleged understatement of gross income. For 1960, appellant's return reflected a gross income of $43,941.53 and taxes owing in the amount of $16,745.74. The government contended, and the Court found, that appellant's gross income for that year was, in fact, $78,441.53, with resulting tax liability of $38,029.21. The $34,500 understatement is attributed to a business transaction from which appellant admittedly received payments totalling $60,000 in currency, but which he claimed was contractually due to be shared by two other men, Edward G. Rosenbaum and Charles S. Tobin.

I

The issues in the case are preponderantly factual. Sixty-one witnesses testified, 144 exhibits were received, and the transcript ran to 2871 pages. In view of the finding of guilt, we must consider the evidence in the light most favorable to the government, *Chastain v. United States,* 5 Cir., 1956, 237 F. 2d 422; *Rickey v. United States,* 5 Cir., 1957, 242 F. 2d 583; *Walker v. United States,* 5 Cir., 1962, 301 F. 2d 94; *Mount v.*

1. "Attempt to Evade or Defeat Tax—Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

United States, 5 Cir., 1964, 333 F. 2d 39, cert. den. 379 U. S. 900, 85 S. Ct. 188, 13 L. Ed. 2d 175; *McDaniel v. United States*, 5 Cir., 1965, 343 F. 2d 785.

Mr. Cohen testified that he paid Rosenbaum $30,000 of the proceeds. Rosenbaum gave Cohen a written receipt for that amount. Moreover, he filed an income tax return admitting receipt of the money, but did not pay the taxes. The government contended that both the receipt and the return were false. This was the key factual issue.[2] On circumstantial evidence, the trial court found against the appellant.

There were other factual issues, however, and a recapitulation of the basic evidentiary elements is indispensable to an understanding of the appeal.

Late in the year 1959, in Miami Beach, Charles Tobin and Edward Rosenbaum had a brief conversation about the mortgage loan business. Rosenbaum stated that he had a "source" for mortgage loan money but was not able to find borrowers. Tobin said he knew of someone in Maryland who might want a loan. Rosenbaum stated that Mr. Cohen, now the appellant, had pension fund sources for mortgage money. Tobin requested Rosenbaum to arrange an appointment. Within a day or two, Rosenbaum, Tobin, and Cohen discussed the matter in a meeting at Cohen's office. Tobin's interested borrower was Samuel Eig, a financier and real estate developer in Silver Springs, Maryland. In early 1960, Eig and Cohen succeeded in arranging a loan for one or more of Eig's motel projects in the amount of $2,350,000. During the early nego-

2. In his opening statement, counsel for the Government stated, "Now, if in fact the defendant Cohen did pay Rosenbaum $30,000 in the year 1960, and if in fact the defendant Cohen did pay Tobin $10,000 in the year 1960, the Government has no case, the ball game is over, and he wins on Count 1."

tiations between the two it was agreed that the brokerage commission on the deal was to be six percent of the amount loaned. When Eig suggested that the brokerage fee should be made the subject of a written contract, Cohen replied that a written contract was not necessary at that time.

On February 25, 1960, appellant made the first collection on the brokerage fee by sending his employee and trusted friend, Howard Morris, to Eig's office in Silver Springs, Maryland, to pick up the money.[3] At Cohen's request this installment amounted to $41,000, with a check being written for $11,000 and the remaining $30,000 being paid in currency in the form of three hundred $100 bills. Two of Eig's associates were present in the Silver Springs office when the cash was delivered,[4] and after Morris' return to Miami Beach appellant called Eig and complained about the "delegation" present when the currency was picked up.

---

3. In dispatching Morris for the money, appellant wrote the following letter, hand carried by Morris and delivered to Mr. Eig:

"Law Offices of Ben Cohen, 420 Lincoln Road, Miami Beach, Florida.
February 25, 1960

"Mr. Sam Eig, Silver Springs, Maryland.

"Dear Mr. Eig: The bearer of this letter, Mr. Howard Morris, is a very dear friend of mine and you have seen him in my office on many occasions. I am taking the responsibility that you give him the package that you have for me and that it will be delivered to me. You are also authorized to turn over the check you have made payable to me. This letter will suffice as a receipt. Any courtesies you may extend to Mr. Morris will be appreciated by me, as he is my dearest friend.

"Most sincerely, Ben Cohen."

4. Morris refused to give a receipt for the cash and immediately after his departure those present, Eig, Shearin, McKeever, and Lawrence Eig, Jr., wrote and attested the following note on the bottom of the letter received from appellant:

"2/26/60. Note: Package referred to above contained $30,000 in cash, the amount of which was verified in my presence by the recipient, Mr. Howard Morris."

On March 8, 1960, Morris again made the trip to Silver Springs, and the second installment on the commission was collected. On this occasion he received cash in the amount of $30,000, and again refused a request to give a written receipt. The third payment, a check for $5,000, was mailed to Cohen the next day.

Appellant employed a bookkeeping system whereby his secretary entered receipts and disbursements in appropriate journals. His cash receipts journal for the period reflected the payments by check, but no entry was made as to the $60,000 cash.

In January, 1961, appellant called McKeever, a business associate of Eig's, to discuss the remainder of the fee due on the brokerage commission. During the conversation he inquired as to how the $60,000 cash payments were carried on Eig's books. An immediate answer was not given, but McKeever wrote the next day indicating that Cohen had received $63,000 in cash and $16,000 by checks.[5]

Approximately ten days later, McKeever went to Miami. Shortly after arrival he called the appellant, who, immediately after answering the phone, asked McKeever if he had been contacted by the FBI. McKeever replied that he had not, and the appellant informed him that they would talk about it the next day. As scheduled, the parties, along with Eig and Tobin, met in appellant's office. The letter was brought up at once, with appellant complaining about the $33,000 figure and the mention of cash payments. The $3,000 mistake was acknowledged, but appellant continued to

5. Appellant's exhibit of the letter indicates one of the cash payments to have been in the amount of $33,000 which would indicate a cash disbursement of $63,000, however, the party who authored the letter testified this to be error and that he penciled through the $33,000 amount on the file copy and entered $30,000.

complain about the mention of cash payments, and demanded that all copies of the letter be destroyed. Another inquiry was made as to how the payments were reflected on Eig's books. When informed they were probably posted as cash disbursements in payment for brokerage fees, the appellant exclaimed that "this could not be allowed to stand". He then went on to tell those present that the normal method for handling a transaction of this nature was "to cash checks in small amounts, and accumulate the cash in a safe deposit box". Thereafter the appellant stated that McKeever was going to have to declare part of the brokerage fee on his return. A heated exchange took place and the meeting broke up.[6]

---

6. McKeever's testimony about this meeting justifies its inclusion in this footnote:

"Mr. Cohen then asked me why I stated in the letter that the two sums of $30,000 had been paid to him in cash.

"I said, 'I thought this was what you had asked me for, a detailed breakdown of all the payments.'

"He said, 'Indeed not. I wanted no mention of cash,' and he demanded me that all copies of this letter be destroyed.

"I made no reply to this demand. At that point, Mr. Cohen, with some heat and agitation, asked me how our books showed the payment of these two $30,000 payments in cash.

"I said I hadn't made a personal examination of our books, that normally our auditors posted the books from the cash disbursement records obtained from checkbook stubs. However, I did tell him that I presumed and was fairly confident that the books would show these payments to him as a brokerage fee and that they must show this in order to be properly deductible as an expense to our corporation.

"Mr. Cohen then states, 'This cannot be allowed to stand.'

"We had a general conversation at this point which was somewhat heated about this matter, and I said I knew of no other way to handle a cash expense disbursement of the corporation other than showing in the books what it actually was.

"Mr. Cohen then said he assumed that we had enough intelligence to know how to handle it, I said, 'I don't know what you are talking about.'

Later, several meetings took place, during the course of which the appellant expressed concern about the FBI investigation and offered to substantially increase the share of the brokerage fee to be paid to Tobin. At one such meeting, Tobin's son, an attorney, was retained by the appellant (on the promise of a $5,000 fee) to draw up a contract to cover the arrangement and distribution of the brokerage commission. The agreement, to be back-dated to the time of the original loan contract, was to indicate that the money was to be distributed as follows: $25,000 to Tobin, $15,000 to Rosenbaum, and $36,000 to the appellant. This proposed contract was taken to Eig, in Maryland, who refused to sign it. A substitute was then drawn, indicating that a commission of six percent, less service fees and appraisal charges, was to be paid to Cohen. There was also a clause that the broker could employ or act in concert with others, but no specification was

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"At that point, Mr. Cohen said, 'Well, the normal method is to cash checks in small amounts and accumulate the cash in a safe deposit box,' and I was fairly stunned at this, and I don't recall making any particular comment about that.

"Mr. Cohen next turned to Mr. Charles Tobin and said, 'Charlie, what income tax bracket are you in?'

"Mr. Tobin looked a little shaken and did not answer him. Mr. Cohen continued to be more and more agitated and turned to me in a rather rude and violent manner and said, 'John, you are going to have to declare some of this on your income tax return.'

"This made me very angry, not only the statement itself, but the manner in which it was said. I was extremely shaken, because prior to this time I had known Mr. Cohen as a very fine gentleman, a man well endowed with all the social grees, who I had found to be a very pleasant person, and this sudden change in his temperament was a shocking thing to me, and I got angry and got out of the chair and I said, 'Mr. Cohen, I am not going to have any discussion that might be construed as a conspiracy.'

"Mr. Cohen said, 'What do you mean by 'conspiracy'?'

"I said, 'You as an attorney should know better than I.'

'Then Mr. Eig got up. He knew I was quite angry. He said, 'Come on John, let's go,' and we left the room."

made as to distribution of the funds to anyone other than the appellant. On receiving Eig's proposed contract, appellant became violently disturbed [7] over the provisions providing for the appraisal and pension fund deductions as well as the omission of a clause indicating distribution of the money to Rosenbaum and Tobin in addition to himself.

In 1960, appellant paid Tobin, as a part of his share of the brokerage commission, two cash installments amounting to $5,500. In 1961, he made a cash payment of $4,500. Just prior to the payment of the $4,500 appellant gave Tobin a check written for this amount and requested that he hold it for a few days to give appellant an opportunity to redeem it for cash. Redemption was made, and at the time Tobin received the $4,500 in cash he signed a back-dated receipt indicating receipt of $10,000 in cash from the appellant as his share of the brokerage fee.

In March, 1961, when appellant's accountant was in the process of preparing Cohen's 1960 return, he learned for the first time that there was an additional

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7. Tobin described Cohen's reaction in the following testimony:

"A. Mr. Cohen was very much disturbed by this contract being sent to him in lieu of receiving the original draft which my son had prepared, and he became so violent that he took the contracts and actually crumpled them in his hand and threw them, either on the floor behind his desk or in the waste paper basket, and started a tirade that Eig wanted everything done his way and that again, that he wished that he had never seen the deal.

"Everyone connected with it was referred to individually as an 'SB,' and so on and so forth, including myself and Ed Rosenbaum, and so forth.

"Finally he seemed to come out of this rage and he became normal again.

"Previously before this transaction I had known him as a very nice individual, not given to rages, but through this and that—that was a typical example of his rage, which was absolutely unexplainable to me, but he finally signed it, and that was that."

$20,000 item, not shown on Cohen's books, to be included in the income tax return for 1960. This item was explained as being a part of the commission fee from the Eig transaction, along with the $11,000 and $5,000 items which were already reflected on appellant's cash receipts journal. In answer to the accountant's request for supporting memorandum on this figure, the appellant produced the contract agreement between him and Eig and two signed receipts—one from Rosenbaum indicating he had received $30,000 and the other from Tobin for $10,000.

Rosenbaum was jointly indicted with Cohen as an aider and abettor. His case was severed. Neither side called him as a witness at the trial.

Appellant testified that he had paid over the $30,000 and $10,000 to Rosenbaum and Tobin respectively. He produced their signed receipts indicating they had received the money, along with their tax returns which reflected that both had reported the same as income for the year.[8] He explained that Rosenbaum had wanted his share of the proceeds in cash and it was for this reason that payment in currency was requested. He could give no explanation as to why he had demanded all $60,000 in cash since Rosenbaum alone wanted currency. As to his portion of the first installment, which allegedly amounted to $7,500, he testified that it was placed in a box in the attic of his home and kept there until spent for various items.

Rosenbaum was not called as a witness, so it was essential to prove circumstantially the part he played in the tragedy. The government's proof established that Rosenbaum really played a very minor role in the business and legal transactions. He arranged an ap-

8. Tobin later filed an amended return indicating receipt of only the $5,500 payment in 1960.

pointment between Tobin and Cohen, and this was his contribution. He had no influence with the Teamsters Pension Fund, attended no more than one meeting with the interested parties, and on one occasion was described by appellant as a "deadbeat, who borrows from everybody he can". It was shown that in 1960, at the time Rosenbaum allegedly received the $30,000 he owed some $35,000 in back taxes, going back to 1951, none of which was paid in 1960 or within three years thereafter, despite attempts to collect. He was in debt to many and made no payments on these outstanding obligations. He made no payments on outstanding medical bills amounting to $3,750. A $1,200 judgment against him was uncollectible. The trial judge described Rosenbaum's condition as "penurious".

The unpublished memorandum opinion of the Trial Judge consumes eighteen printed pages of the appellate record. Quoting a portion of the findings, he stated as follows:

A

"The Court does not believe that Rosenbaum received $30,000 or any substantial portion thereof during the year 1960."

B

"Furthermore, the Court does not believe that from the outset it was a part of the oral agreement that Eig would pay a brokerage commission jointly to Tobin, Rosenbaum, and the defendant."

C

"I find no substantial credible evidence which indicates that there was a partnership among defendant Cohen, Charles Tobin, and Rosenbaum to pay the brokerage commission paid by Eig."

II

Appellant assigns the following grounds for reversal: (1) the conviction is not supported by the evidence; (2) the admission of evidence concerning Rosenbaum's financial condition was erroneous; (3) by indicting Rosenbaum the government illegally deprived appellant of a vital defense; and (4) the denial of the motion for a new trial was error.

1. Is the conviction supported by substantial evidence? We think it is. We are well aware, however, that we here encounter a rare situation. Rosenbaum did sign and deliver a reecipt for the $30,000. He did make and file an income tax return for the year 1960, in which he again admitted the receipt of the money. He did not appear in Court and did not repudiate these documents. On the other hand, appellant testified under oath that the receipt was genuine and that he did pay the money. No witness, of his own knowledge, directly testified either that the receipt was false or that the money was not actually paid. This gave rise to the argument of counsel, strongly urged at the Bar of this Court, that there was absolutely no evidence at all, substantial or otherwise, to support the finding of the District Judge that the receipt was false and that the money was not paid.

The trouble with this contention is that the immediately preceding facts constitute only a small part of the entire evidence in the record. It was the duty of the trial court to weigh and consider all the proof. He could not, and should not, be limited to any special feature of the evidence. As has often been said in other cases, he did not have to consider Rosenbaum's receipt and income tax return "in a vacuum".

Rosenbaum, although physically available, was not called by government or defense to confirm or deny that he received the money. We shall say more of this at a later point in this opinion with reference to Rosenbaum's status as a co-indictee, whose case had been severed and who was not then on trial.

We realize also that the conviction of a man on the theory of non-payment at a time when he stands armed with a written receipt raises very serious practical considerations. Most taxpayers rely on written receipts as proof of their expenditures, and the government ordinarily honors such receipts. The fact remains, however, which supposedly is known to everyone, that the law permits falsity, fraud, or other legal infirmity to be proven in appropriate circumstances as to any written instrument, whether it be a will, deed of conveyance, contract, release, or receipt. Obviously, it is unlikely that Rosenbaum's receipt would have been challenged but for the attendant circumstances which have been recited. And once challenged, the falsity of the receipt in this particular criminal prosecution had to be proven beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence. After hearing all the proof in a fourteen day trial, the Court below categorically stated that he did not believe appellant's testimony and thus found both that no substantial payment was made to Rosenbaum and the receipt was false.

In tax evasion cases, as in all other criminal prosecutions, guilt may be established beyond a reasonable doubt by circumstantial evidence, *United States v. Woodner,* 2 Cir., 1963, 317 F. 2d 649; *Swallow v. United States,* 10 Cir., 1962, 307 F. 2d 81, cert. den. 371 U. S. 905, 83 S. Ct. 504, 9 L. Ed. 2d 499, reh. den. 372 U. S.

925, 83 S. Ct. 718, 9 L. Ed. 2d 731; *United States v. Doyle,* 7 Cir., 1965, 234 F. 2d 788, cert. den. 352 U. S. 893, 77 S. Ct. 132, 1 L. Ed. 2d 87. It is elementary that a verdict of guilty, whether at the hands of court or jury, is not to be overturned unless there is no substantial evidence to support it, *Newsom v. United States,* 5 Cir., 1964, 335 F. 2d 237; *Curtis v. United States,* 5 Cir., 1961, 297 F. 2d 639, cert. den. 369 U. S. 838, 82 S. Ct. 867, 7 L. Ed. 2d 842, and numerous other cases which are digested in Criminal Law 1159(2) i, West's Modern Federal Practice Digest. Of course, the precedents are replete with instances in which, after thorough consideration of the evidence, viewed in the light most favorable to the government, appellate courts have concluded that the evidence did not support the conviction. In the present exercise of this serious responsibility we must consider not only direct testimony of positive facts but also all inferences which the trial court might reasonably have drawn from those facts, *Ah Ming Cheng v. United States,* 5 Cir., 1962, 300 F. 2d 202. The circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create basis for legal inference and not mere suspicion, *Wesson v. United States,* 8 Cir., 1949, 172 F. 2d 931. In the absence of direct proof, the circumstances relied upon to sustain a conviction must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence, *Barnes v. United States,* 5 Cir., 1965, 341 F. 2d 189.

Upon mature reflection, without recapitulating in detail that which has already been stated of the circumstances of this case, we are inexorably compelled to the view that there was substantial evidence to support the findings of the trial court, especially when

we consider that he observed the demeanor of the witnesses and expressly stated that he did not believe the testimony of the appellant that the money was paid to Rosenbaum and a true receipt obtained therefor.

In general, this case is quite analogous to that of *Woodner, supra,* in which a conviction was affirmed in the Second Circuit, but the circumstances go much further in such particulars as: (1) the desire of the appellant, expressed from the beginning, to collect $60,000 of this commission in currency; (2) the refusal of his messenger to give a receipt for the money; (3) appellant's expressed concern over the presence of witnesses at the delivery of the cash; (4) his inquiry as to how the payments were reflected on the books of the borrower; (5) his statement that this could not be allowed to stand; (6) his statement that such disbursements should be handled by making small withdrawals by checks and depositing the proceeds in a safe deposit box; (7) his efforts in 1961 to obtain a back-dated contract in writing which would support his position in the matter; (8) his inability to explain why he wanted the $60,000 in cash, although he had first offered the explanation that the cash was for Rosenbaum, who, by his own contention, was not to receive over half that amount; (9) the secreting of part of the proceeds in his attic; (10) the failure to enter the receipt of the cash on his office journals, although the checks were entered; and (11) his obtaining the back-dated receipt from Tobin. See *United States v. Eley,* 7 Cir., 1963, 134 F. 2d 127; *United States v. Mollet,* 2 Cir., 1961, 290 F. 2d 273; and *Holt v. United States,* 9 Cir., 1959, 272 F. 2d 272.

2. Appellant earnestly complains of the testimony admitted as to the impecunious, or "penurious", con-

dition of Rosenbaum in 1960. He says that this amounted to a "species of reverse net worth—but without the safeguards insisted upon in net worth prosecutions". Of course, this was a prosecution of Cohen, not Rosenbaum. We agree that failure to pay bills, debts, and taxes may not necessarily be proof of poverty. It is common knowledge that some people do make a persistent practice of not paying, even when they have the funds. They prefer to hoard the money rather than to pay their obligations. We think, however, in the context of this case, this evidence was relevant as a part of the over-all circumstances of the case. We are of the further opinion that admitting this proof could not and does not constitute reversible error for the reason that if this testimony had been entirely rejected there would yet remain substantial evidence of guilt. In fact, the Trial Court specifically states that Rosenbaum's penurious condition was not the sole basis for his belief that Mr. Cohen did not pay him the money.

3. Is there any merit in appellant's contention that by jointly indicting Rosenbaum as an aider and abettor the government illegally made Rosenbaum unavailable as a witness and thus conferred immunity upon appellant? We think not.

In his brief, appellant states his point: "The government may not prosecute an individual whom it deprives of his defense to the accusation it makes," and "* * * Rosenbaum's critical testimony was made unavailable, first by the prosecution, which caused Rosenbaum to be indicted as an aider and abettor (but not as a co-conspirator) * * *." If Rosenbaum had been on trial with Cohen as a co-defendant then he could not have been called as a witness on Cohen's be-

half, *United States v. Housing Foundation of America,* 3 Cir., 1949, 176 F. 2d 665. But there had been a severance and Rosenbaum was not on trial. Apparently severance had been granted to comply with the rule later stated in *United States v. Echeles,* 7 Cir., 1965, 352 F. 2d 892. At the beginning of the trial, there was discussion as to whether either the government or the defendant would call Rosenbaum. Neither did. The government is privileged not to call a witness in whom it has no confidence and is under no duty to present evidence for the defense, *Cendella v. United States,* 1 Cir., 1955, 224 F. 2d 778, cert. den. 350 U. S. 901; 76 S. Ct. 179; 100 L. Ed 791. True, the government had the burden of proving the falsity of Rosenbaum's receipt but it could choose to undertake it without calling Rosenbaum. The defense could have called Rosenbaum. The choice not to do so was no doubt the product of careful strategy of outstandingly able counsel who represented Cohen. For one thing, it might have been considered best not to submit Rosenbaum to cross examination. It might have been thought, with reason, that one who habitually failed to pay his own taxes would not be a very powerful witness for one under a like accusation. In any event, we think the whole matter dissolves when it is remembered that had Rosenbaum been called he could immediately have invoked his constitutional privilege against self-incrimination regardless of whether he was or was not under indictment. At any rate, the defense could not preserve the point, if there is one, by simply assuming unavailability. By the above discussion we do not mean to infer that if the government chooses to try any particular defendant it must be careful not to jointly indict others who are also subject to indictment for particiaption or complicity in the same offense.

There was no error in the denial of the motion for a new trial. The motion rested on the newly discovered evidence that certain witnesses had heard Rosenbaum admit he received the $30,000. Leaving aside any question of the hearsay character of this evidence, it was proven at the trial that Rosenbaum had twice admitted in writing that he received the money. Hence, the District Judge was within permissible discretion when he held the evidence to be cumulative and denied the motion, *Reno v. United States,* 5 Cir., 1965, 340 F. 2d 307.

Able counsel in a thorough brief have raised other points. They have been carefully considered, but they avail nothing toward the reversal of this judgment.

Nor have we ignored the fact that there was direct, positive evidence to the effect that Mr. Cohen understated his 1960 income by $4,500, which he did not pay until 1961 and which he attempted to cover by a backdated receipt from Tobin.

The Judgment is AFFIRMED.

APPENDIX B.

JUDGMENT.

Before WISDOM and COLEMAN, *Circuit Judges,* and HUGHES, *District Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed in accordance with the opinion of this Court; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent therewith.

July 21, 1966.

APPENDIX C.

ORDER ON PETITION FOR REHEARING.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 22,505.

BENJAMIN COHEN.

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(August 24, 1966.)

ON PETITION FOR REHEARING.

Before WISDOM and COLEMAN, *Circuit Judges,* and HUGHES, *District Judge.*

IT IS ORDERED that the Petition for Rehearing in this cause is hereby

DENIED;

FURTHER ORDERED that the Motion for Stay of Mandate pending filing and disposition of a Petition for Certiorari in the Supreme Court is

GRANTED.

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237-003—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 570

BENJAMIN COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A1–A17) is reported at 363 F. 2d 321.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1966 (Pet. A18) and a petition for rehearing was denied on August 24, 1966 (Pet. A19). The petition for a writ of certiorari was filed on September 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government improperly deprived petitioner of Rosenbaum's testimony by indicting Rosenbaum for aiding and abetting petitioner.

2. Whether the district court erred in giving some weight—on the issue of whether petitioner paid $30,000 to Rosenbaum in 1960—to circumstantial evidence, such as proof that throughout 1960 Rosenbaum was impecunious and had not paid his debts or his taxes.

3. Whether petitioner is entitled to a further hearing in light of two post-trial developments: (1) The indictment against Rosenbaum has been dismissed, and (2) Rosenbaum's 1960 income tax on the $30,000 which petitioner allegedly gave him in that year has been paid.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 7201.)

STATEMENT

In 1963 petitioner was indicted in the United States District Court for the Southern District of Florida on two counts of wilfully attempting to evade and defeat his income taxes, for the years 1960 and 1961, by filing false and fraudulent returns, in violation of § 7201 of the Internal Revenue Code of 1954. Edward G. Rosenbaum was charged as an aider and

abettor in Count One (1960) and his case was severed from that of petitioner. (R. 8–11, 1284–1287.) Petitioner waived trial by jury and was tried by the court.

The record shows, in summary, that petitioner aided in arranging a $2,350,000 loan from a union pension fund to Samuel Eig, a Maryland real estate developer. In 1960 Eig paid petitioner for these services a fee of $76,000—$16,000 by checks and $60,000 in cash. Petitioner reported $36,000 of this fee on his 1960 income tax return and claims that during 1960 he paid the remaining $40,000 to two of his associates—$10,000 to Tobin and $30,000 to Rosenbaum. After a 14-day bench trial, at which 61 witnesses testified and 144 exhibits were introduced into evidence, the district judge concluded that petitioner did not pay any substantial amount to Rosenbaum during 1960 and that petitioner paid only $5,500 to Tobin during that year. The district court found petitioner guilty on Count One (1960) and not guilty on Count Two (1961), and sentenced him to 18 months' imprisonment and to pay a fine of $10,000 (R. 1317, 1361). The court of appeals affirmed (Pet. A1–A17) and denied rehearing (A19).

The record and findings of the district court (Judge Fulton) with respect to Count One show the following (R. 1302–1315):

In late 1959 Tobin knew that Eig desired to borrow a substantial sum of money. Rosenbaum introduced Tobin to petitioner, who was able to arrange mortgage loans from one of the Teamsters' pension funds.

In early 1960 petitioner arranged a $2,350,000 loan to Eig, and Eig agreed orally to pay petitioner six percent of the amount loaned. Petitioner rejected Eig's offer to put the agreement in writing. During 1960 Eig paid petitioner a total of $76,000—which, at petitioner's request, was paid $60,000 in cash and $16,000 by checks. Petitioner recorded on his books the receipt of only the $16,000 in checks. Petitioner complained to Eig that "a delegation" had been present when petitioner's messenger picked up the first of the two $30,000 cash payments. Later petitioner insisted that Eig destroy a letter his associate had written to petitioner stating that $60,000 cash had been paid petitioner. Petitioner also complained when he was informed that Eig's books showed that $60,000 cash had been paid to him; petitioner stated "This cannot be allowed to stand." At a meeting petitioner suggested that one of Eig's associates declare some of the $60,000 cash payment on his income tax return. (R. 39–45, 56–59, 187–189, 304–307, 367–368, 750–754.)

Later in 1960 petitioner paid $5,500 to Tobin for his services. In March 1961 petitioner paid an additional $4,500 to Tobin and had Tobin sign a back dated receipt stating that he had received the entire $10,000 during 1960. (R. 371–372, 384–387.)

Petitioner testified that he had also paid $30,000 cash to Rosenbaum in 1960. (R. 990–992.) Petitioner introduced into evidence (1) a receipt signed by Rosenbaum stating that he had received this amount during 1960 and (2) Rosenbaum's 1960 income tax return reporting $30,000 as having been

received in that year. (R. 1436–1439, 1479.) Rosenbaum had been indicted along with petitioner as having aided and abetted petitioner's 1960 tax evasion, and had obtained a separate trial. (R. 11, 1284–1285.) Neither the government nor petitioner called Rosenbaum as a witness at petitioner's trial. The government showed, however, that petitioner had known Rosenbaum for many years and had loaned him money from time to time (R. 1040–1041), that Rosenbaum was a frequent impecunious visitor at petitioner's law office (R. 389–393, 781–863, 1040–1041, 1059), that for a number of years, including the tax years set forth in the indictment, Rosenbaum had a substantial unpaid tax liability to the government which remained unsatisfied at the time of trial, notwithstanding collection efforts (R. 680–682, 869–870, 875–876, 1059, 1436, 1473), and that petitioner himself had, at about the time of the alleged $30,000 payment to Rosenbaum, advised Tobin not to lend money to Rosenbaum because he had borrowed money from everyone and was a deadbeat (R. 391–393; Pet. 5).

ARGUMENT

1. Petitioner contends that by indicting Rosenbaum for aiding and abetting petitioner, the government improperly deprived petitioner of Rosenbaum's testimony. If this argument were correct, it would mean that whenever a group of individuals participated in the commission of a crime only one could be indicted. Moreover, even if the government had not indicted Rosenbaum, the latter would still have been justified

in invoking his privilege against self-incrimination if called to testify.[1]

The court of appeals carefully considered this contention and rejected it, stating that (Pet. A16):

> * * * At the beginning of the trial, there was discusison as to whether either the government or the defendant would call Rosenbaum. Neither did. The government is privileged not to call a witness in whom it has no confidence and is under no duty to present evidence for the defense, *Cendella* v. *United States*, 1 Cir., 1955, 224 F. 2d 778, cert. den. 350 U.S. 901; 76 S. Ct. 179; 100 L. Ed 791. True, the government had the burden of proving the falsity of Rosenbaum's receipt but it could choose to undertake it without calling Rosenbaum. The defense could have called Rosenbaum. The choice not to do so was no doubt the product of careful strategy of outstandingly able counsel who represented Cohen. For one thing, it might have been considered best not to submit Rosenbaum to cross examination. It might have been thought, with reason, that one who habitually failed to pay his own taxes would not be a very powerful witness for one under a like accusation. In any event, we think the whole matter dissolves when it is remembered that had Ros-

[1] The cases cited by petitioner (Pet. 10) are not apposite. In those cases the courts held that if the government invoked executive privilege or otherwise refused to produce relevant documents, it could not prosecute the defendants. Here, however, the government has neither refused to produce any relevant documents nor invoked any privilege. Petitioner is not immunized from prosecution because his cohorts have been indicted.

> enbaum been called he could immediately have invoked his constitutional privilege against self-incrimination regardless of whether he was or was not under indictment. At any rate, the defense could not preserve the point, if there is one, by simply assuming unavailability. * * *

Petitioner wrenches the last sentence out of context and presents it as the cornerstone of his argument in the petition for certiorari. It is clear that the court of appeals passed on petitioner's contention and did not rest on the ground that petitioner had waived the point by failing to call Rosenbaum. In any event, the court of appeals was correct in stating that if petitioner wished to preserve the argument, he should have called Rosenbaum as a witness. The cases cited by petitioner (Pet. 11) merely hold that when two defendants are being tried together, one cannot call the other as a witness unless the latter consents.

2. There is no substance in the argument (Pet. 12–13) that the trial judge erred in giving some weight, on the issue of whether Rosenbaum had received the $30,000 from petitioner, to the facts that Rosenbaum was impecunious and had not paid his debts or his taxes. If Rosenbaum had made any payments on these or other obligations or had given any other indication of comparative affluence at or about the time he allegedly received the $30,000 in cash from petitioner, such evidence would plainly have been admissible as tending to bolster petitioner's theory of the case. Conversely, the utter lack of any such payments or signs of affluence was clearly admissible as tending to show that Rosenbaum did not receive the $30,000 or

any substantial part thereof. *United States* v. *Augustine*, 189 F. 2d 587, 590 (C.A. 3).[2]

Moreover, as the trial judge made clear, the "finding that Rosenbaum did not receive $30,000 in 1960, or a substantial portion thereof, is not based solely upon his failure to pay his 1960 taxes; neither is it based solely on the circumstantial evidence tending to show his penurious condition; but is based upon the totality of the evidence in this regard" (R. 1315). Petitioner no longer contends that the facts of record were insufficient to support this finding. As the court of appeals stated (Pet. A9–A10):

> * * * The government's proof established that Rosenbaum really played a very minor role in the business and legal transactions. He arranged an appointment between Tobin and Cohen, and this was his contribution. He had no influence with the Teamsters Pension Fund, attended no more than one meeting with the interested parties, and on one occasion was described by appellant as a "deadbeat, who borrows from everybody he can". It was shown that in 1960, at the time Rosenbaum allegedly received the $30,000 he owed some $35,000 in back taxes, going back to 1951, none of which was paid in 1960 or within three years there-

[2] Petitioner's claim that any proof of Rosenbaum's financial condition constitutes a use of the net worth method in reverse (Pet. 12–13) is manifestly without foundation. Proof that Rosenbaum did not in 1960 act like a man who had just received $30,000 in cash is merely one of the many pieces of "circumstantial evidence" (R. 1315) which the trial judge relied upon in concluding that petitioner had not paid $30,000 to Rosenbaum.

after, despite attempts to collect. He was in debt to many and made no payments on these outstanding obligations. He made no payments on outstanding medical bills amounting to $3,750. A $1,200 judgment against him was uncollectible. The trial judge described Rosenbaum's condition as "penurious".

In addition, the record shows that petitioner went to great pains in an attempt to conceal the fact that he had received $60,000 in cash from Eig in addition to the $16,000 in checks. For example, he entered only the latter amounts on his books, initially refused to enter into a written agreement with Eig, complained bitterly when Eig's associates wrote a letter stating that petitioner had received $60,000 cash, and insisted that Eig's books "cannot be allowed to stand" when told that they reflected the $60,000 cash payment to him. (R. 42, 187–189, 368–369, 750–754.) Clearly, he would not have engaged in this elaborate attempt to conceal the payments if he had not expected to retain most of the cash. The evidence—which the trial judge heard and evaluated—demonstrates that after petitioner's attempts to conceal the receipt of the cash had failed, he shifted to the device of claiming that he had paid much of the cash to Rosenbaum, whose tax bracket was approximately one-half that of petitioner.[3]

3. Equally without merit is the contention (Pet. 13, 14) that petitioner is entitled to either a new trial or a remand to the district court in light of two post-trial

[3] In any event, petitioner no longer disputes that he falsely excluded $4,500 from his 1960 income although he did not actually pay that amount to Tobin until 1961 and that he attempted to conceal this fact by obtaining a back dated receipt from Tobin. (R. 384–387, 1481.)

events (neither of which is in the record) *i.e.*, (a) the dismissal of the indictment against Rosenbaum, and (b) the payment of Rosenbaum's tax on the $30,000.

First, the indictment was dismissed as to Rosenbaum on February 26, 1966, because his health would not permit him to stand trial. That does not mean that Rosenbaum would now be available as a witness, for he could still claim his privilege against self-incrimination.[4] Moreover, even if Rosenbaum testified that he had received the $30,000, nothing would be added to petitioner's case, since the district court recognized that Rosenbaum had always claimed that he received the $30,000. In denying the motion for a new trial, the district court said that Rosenbaum "spoke through his tax return to the Court" (R. 1366) and the fact that he "admitted" receiving the $30,000 is "not anything that the Court was not mindful of and did not take into consideration * * *" (*id*).

Second, shortly before Rosenbaum was scheduled to go on trial on charges of aiding and abetting petitioner in committing the crime of tax evasion, the $10,602 in tax stated as due the United States on Rosenbaum's 1960 return was paid. However, it was certainly to Rosenbaum's advantage to show that his

[4] One of the several possible theories on which Rosenbaum might still be indicted is that he has engaged in a continuing conspiracy with petitioner to evade and defeat the latter's taxes. The latest overt act in that conspiracy was the 1966 payment of $7,602 to the Internal Revenue Service on account of the tax liability stated in Rosenbaum's 1960 return in order to maintain the fiction that he had received the $30,000 from petitioner. Hence the statute of limitations would not bar prosecution until 1972. Internal Revenue Code of 1954, § 6531.

(Rosenbaum's) 1960 tax return was true, *i.e.*, that he really had received the $30,000 from petitioner. Thus, payment of the tax on the $30,000 shortly before Rosenbaum's trial constitutes no more than a reassertion that Rosenbaum had received the money. Conspicuous by its absence is any allegation that Rosenbaum has ever cleared up the back taxes, amounting to about $35,000, which he owes for years prior to 1960 (R. 869–870). Nor did the District Director of Internal Revenue act improperly in accepting $10,602 in payment of Rosenbaum's supposed 1960 tax liability on the $30,000. Since Rosenbaum filed a 1960 tax return stating that he owed $10,602 in income tax and never filed either an amended return or a claim for refund, the District Director was required by § 6201(a)(1) of the Code to assess and collect the tax stated on Rosenbaum's return. Moreover, since petitioner's 1960 tax bracket was substantially higher than Rosenbaum's, the government has (even after payment of Rosenbaum's stated 1960 tax liabilities) collected only $10,602, whereas the asserted deficiency in petitioner's 1960 income tax is $21,283.

The case of *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, relied upon by petitioner (Pet. 14), is inapposite. There the Court remanded for a further hearing because newly discovered evidence (suggesting fraud by the taxpayers) indicated that the facts relied upon by the court of appeals in disposing of the case in favor of the taxpayers were not true. Since the district court hearing might have mooted the ground on which the court of appeals had decided the case (by showing that

the facts relied upon by the court of appeals really did not exist), this Court postponed its review of the case until after the district court hearing. Here, however, the two "new" facts do not in any way impeach either the district court's or court of appeals' decisions (and, in fact, the court of appeals knew of both "new" developments when it decided the case).[5] Since there is no need for further proceedings below, there is no reason for this Court to postpone its review of the instant case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Both developments were pointed out in petitioner's Reply Brief in the court below.

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IN THE

Supreme Court of the United States

October Term, 1966.

No. 570.

BENJAMIN COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY MEMORANDUM.

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If petitioner, a member of the Bar, were not facing imprisonment and professional destruction in consequence of the judgment now sought to be reviewed, the prosecution's Brief in Opposition would qualify as an example of advocacy by obfuscation, arguing as it does questions that the petitioner in this case refrains from presenting.

But that is not all. The prosecution urges that petitioner should go to jail, without a new trial or even a new hearing, for having deducted from his reported income $30,000 paid to one Rosenbaum which the prosecution says was never paid, while simultaneously it argues that the United States is entitled to retain the not insubstantial tax that Rosenbaum paid it on the

footing that in fact he received the same $30,000 from petitioner in the precise year that petitioner dealt with this sum as a deductible payment.

This is more than merely inconsistency, more than simply lawyers' cynicism. It constitutes a truly frightening example of how the government—"the potent, the omnipresent, teacher" (Brandeis, J., in *Olmstead v. United States,* 277 U. S. 438, 471, 485)—currently deals with its citizens. We submit that a result so unconscionable and indeed so shocking calls for scrutiny by this Court.

First. We said, very plainly and explicitly (Pet. 9, 10), that the argument "that the United States could not properly prosecute an individual for acts in respect of which it simultaneously deprives him of his defense against such a prosection, in this instance depriving him of Rosenbaum's testimony by causing Rosenbaum to be indicted as a co-defendant," "has now been rendered moot by the circumstance that the indictment against [Rosenbaum] has, since [the] trial and before the argument below, been dismissed * * *."

Yet in the face of this express disclaimer, and while admitting the dismissal of the indictment (Br. Op. 10), the prosecution not only includes petitioner's plainly abandoned contention as a question presented (No. 1, Br. Op. 1), it argues the merits of that non-question at great length (Br. Op. 5-7).

Similarly, while petitioner only discusses *arguendo* the obvious proposition that the circumstantial evidence of the prosecution's reverse net worth treatment of Rosenbaum is less trustworthy than Rosenbaum's direct testimony as to whether he in fact received $30,000 from petitioner (Pet. 12-13), the prosecution

inflates that discussion also into a question presented (No. 2, Br. Op. 2), and similarly argues it at length (Br. Op. 7-9).

Second. The first question actually presented by petitioner (Pet. 2) was whether the court below erred in requiring him to call his severed co-defendant Rosenbaum to the stand to claim his privilege, as a prerequisite to establishing that co-defendant's testimonial unavailability, particularly where, as here, the trial judge ruled (R. 1312) that "neither side was in a position to call as a witness the severed defendant, Rosenbaum * * *."

The prosecution asserts (Br. Op. 7) first, that the court of appeals did not hold what it very plainly held in the passage quoted (Br. Op. 6-7); second, that (Br. Op. 7) in any event the court of appeals was right, without citing authorities and with no effort whatever to contradict Wigmore on the point (8 *Evidence* § 2268; see page references to 1940 and 1961 editions at Pet. 11); and, third, that (Br. Op. 10) the dismissal of the indictment as to Rosenbaum "does not mean that Rosenbaum would not be available as a witness, for he could still claim his privilege against self-incrimination," with a footnote about "One of the several possible theories on which Rosenbaum might still be indicted."

Petitioner's position concerning Rosenbaum's testimonial availability by reason of the dismissal was disclosed at the latest in May 1966, when this case was argued below. In the more than six months since, no effort whatever has been made to indict Rosenbaum on the theory now asserted (Br. Op. 10 note 4), "that he has engaged in a continuing conspiracy with petitioner to evade and defeat the latter's taxes."

It is only at the present juncture, with petitioner pressing for a hearing at which (Pet. 14) "Rosenbaum, no longer under indictment, is now compellable to testify," that the prosecution bares its fangs and threatens that, if petitioner is indeed awarded either a new trial or a new hearing, Rosenbaum will once more be indicted so as to make him again unavailable to petitioner as a witness at such new trial or hearing.

We submit that this precise threat is implicit in the prosecution's language that we have quoted from Br. Op. 10. Indeed, that language is not fairly susceptible of any other interpretation.

Third. The salient fact in this case in its present posture, and in the second and last question actually presented by the petition (Pet. 2), is that the United States is about to send petitioner to jail for not having paid $30,000 to Rosenbaum, while simultaneously it is retaining the tax it received from Rosenbaum on the footing that he received this identical $30,000 from petitioner.

The prosecution not only admits that Rosenbaum paid the tax due on the $30,000 he received, it defends the right of the United States to keep the tax thus paid (Br. Op. 11).

But, in order to justify the unconscionable result that thus ensues, the prosecution resorts to arguments that are untenable—and, in respect of some now made, that breathe a spirit of injustice as well.

1. Although admitting that Rosenbaum paid the tax due for 1960 in installments by reason of the $30,000 paid him by petitioner, the prosecution argues that Rosenbaum did not clear up his own back taxes (Br. Op. 11). But here the question concerns the propriety

of petitioner's criminal conviction, not the extent of Rosenbaum's civil obligations.

2. The prosecution argues that the United States collects less if Rosenbaum received the $30,000 from petitioner than if petitioner never made the payment, $10,602 as against $21,283 (Pet. 11). One answer is that this would be so even if the fact of payment had never been questioned. Another is that, so far as the prosecution is concerned, it is not only more interested in $10,681 than in petitioner's liberty, but, as the matter now stands, it keeps the $10,602 paid by Rosenbaum, and it can in addition, if it succeeds in having review denied, assess petitioner for the $21,283 deficiency plus a fraud penalty. The outsider may accordingly wonder whether on this occasion petitioner is dealing with Uncle Sam—or with Uncle Shylock.

3. The argument (Br. Op. 12) that "the court of appeals knew of both 'new' developments when it decided the case" simply makes the decision below even less defensible; as we said (Pet. 9), "a result so unconscionable calls for a better answer, and one more consonant with justice, than that given below."

4. The prosecution reargues the sufficiency of the evidence (Br. Op. 9), although that is not *now* a question in the case; accuses Rosenbaum of conspiracy to evade and defeat petitioner's taxes (Br. Op. 10 note 4), although the $30,000 Rosenbaum received from petitioner in 1960 was precisely the kind of "finders' fees" that constituted Rosenbaum's income of $28,000 in 1965 (Pet. 7); and, finally, the prosecution urges that the district court at the trial had everything before it (Br. Op. 8) because (Br. Op. 10) "Rosenbaum 'spoke through his tax return to the Court' (R. 1366)."

Right there is the fatal and crucial defect in the prosecution's contentions, for there is a vast difference, not of degree but of kind, between a tax return or a receipt and a witness's live testimony.

It was this very contrast, between "the dead page" on the one hand, and the witness's own "tone of voice or the gloss that personality puts upon speech," that was responsible for the deciding votes for reversal and remand in *Von Moltke v. Gillies,* 332 U. S. 708, 727, 730.

The same result should follow here, and for the same reason. At the trial, where, as the district judge said (R. 1312), "neither side was in a position to call as a witness the severed defendant, Rosenbaum," the latter could of course only speak through his tax return or through his receipt. Now, however, with the indictment against him dismissed, he is testimonially compellable. Now the question of payment can be determined with the aid of the observed testimony of both parties to the transaction.

Fourth. In our view, the new facts appearing since the trial—Rosenbaum's tax payment on the $30,000 he received from petitioner and its acceptance and retention by the government, and the dismissal of the indictment against Rosenbaum—call for petitioner to be granted a new trial.

But, at the very least, we submit that the case should be remanded to the district court for a hearing at which, with Rosenbaum available as a witness, it can reconsider its earlier determination, made without Rosenbaum's testimony, as to whether petitioner in fact paid him the $30,000.

Without extending the discussion further, we think it sufficient now simply to note that there is ample

authority in this Court's decisions for a remand for this limited purpose. E.g., *Von Moltke v. Gillies*, 332 U. S. 708; *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115; *Mesarosh v. United States*, 352 U. S. 1; *Shotwell Mfg. Co. v. United States*, 355 U. S. 233.

Fifth. We are dealing, not with merely inconsistent pleadings, but with an inconsistency of position on the part of the United States that reflects seriously and adversely on the administration of criminal justice in its courts. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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